# Major Comment on EPA Coal Ash Amendments Phase 2

RIN 2050-AG98

In developing complex environmental regulations many difficulties can arise. One of the most serious regulatory problems is associated with provisions that impose large burdens yet fail to provide environmental benefit. This comment pertains to a major issue with the coal ash rule that presents such a problem, and can readily be corrected in the upcoming coal ash amendments.

While the coal ash rule was developed under the risk-based RCRA Subtitle D statute, there are facets where EPA created provisions that are largely disconnected from risk. After retiring from EPA, I have performed consulting activities regarding coal ash, and have been struck by a fairly common occurrence, waste management units needing to be closed or corrective action needing to be taken under the rule, in situations where rigorous site specific risk analysis concludes there are no undo risks to human health and the environment. Somehow, the courts, EPA, public, and even industry have gotten so tied up with the complexities and posturing no one has been addressing that a supposed risk-based rule often attacks circumstances where there are no undo risk to human health and the environment. This is simply wrong.

There is a simple corrective solution. In the rule, there is a provision where if criteria are exceeded at the waste management unit boundary, one can determine if the exceedance is from another sources. This can curtail inappropriate closure and corrective action. There simply needs to be the opportunity for another demonstration – a site-specific risk analysis that demonstrates there are no existing undo risk to human health and the environment. I would, however, view a regulatory exceedance at the unit boundary as triggering a risk modeling effort to determine if closure and/or corrective action is necessary to prevent future undo risks to human health and the environment, given the site-specific conditions. Such a process would prevent massive burdens where there are not existing or future potential risks. All that would be needed for the proposed amendment is some language explaining the issue of eliminating large regulatory burdens where there are no meaningful risks being addressed and solicit comment on adding appropriate demonstrations. (Note, such a change would easily exceed criteria for a major rule based on the cost savings.)

If there is a question as to how the existing rule imposes large burdens in situations that have no environmental justification, some basic explanatory background is provided. The main difficulty with the EPA rule is the attempt to address risk in a manner that ignores the need for receptors to be exposed. In addition, while the Agency provided some recognition as to how a nearby surface water body can alter risks, Agency largely ignores influence of surface water bodies on risks. A revealing illustration is to look at a for a very common scenario associated with coal ash surface impoundments. The scenario, is where:

- the State water quality program has found that there is not a surface water quality problem,
- groundwater flow is from the surface impoundment towards a nearby surface water body,
- the intervening land does not contain a drinking water well nor is there a reasonable likelihood of a future drinking water well (this can be quite possible where the utility owns the land that the distance is small), and

o mounding effects are not causing groundwater impacts on properties not owned by the utility.

For such common scenarios, there is no risk to human health or the environment. With no wells between the surface impoundment and the surface water body, there is nothing to impact. On the other side of the surface water body (where there may be drinking water wells), the groundwater flows towards the surface water, and thus is not impacted. With a very close surface water body, the lack of existing and future drinking water wells is reasonable, and the concern with risks shifts to whether there are surface water quality problems – if that is not the case there is no risk to be addressed – if there is a surface water quality problem that should be addressed, most appropriately via state water quality programs. To address risks, the real target for EPA's RCRA rule is where there are impacted drinking water wells or some reasonable concept of potential future wells. (As a side note, where there are no impacted drinking water wells and surface water quality impacts, EPA's desire for the use of an impermeable liner, is of questionable benefit. There are 2 flows entering the surface water from the surface impoundment, namely a surface water discharge and a groundwater to surface water release. A water balance for this situation would be that what goes into the surface impoundment equals what goes out of the surface impoundment (the NPDES discharge and leakage to groundwater). With the addition of an impermeable liner, a basic water balance simply reveals that the 2 releases now become one – the leachate in the unlined situation along with its contaminants becomes part of the surface water discharge. The main function of installing a liner in this situation is that contaminants get released to the surface water body quicker – which is not a meaningful environmental objective.)

There can be lots of variations as to when environmental actions need to be taken. In addressing a risk based statute, the burdens should be justified by having a meaningful impact on risks. A simple adjustment to the rule is to allow a risk assessment to determine those cases where there is no undo risk or reasonable possibility of a future risk. For such cases, the forced closure and corrective action are burdens without benefits. The suggested approach is still preventative in that monitoring at the unit boundary provides the trigger for the risk assessment and modeling.

EPA should solicit comment on the change, and carefully assess the merits of the comments. Much of the coal ash rule was structurally modeled after the municipal solid waste landfill rule, which does contain more risk-based considerations. While some of the municipal solid waste landfill rule features could be adopted, the site specific risk assessment approach is a better fit given where we are in the regulatory process, the tendency for coal ash facilities to be located next to surface water bodies, the size and sophistication of utilities, and the numerous site specific risk assessments that have already been conducted.

A risk based statute is not a license to impose regulations that go well beyond what is needed to protect human health and the environment. The cost impact of the overreach is likely in the billions of dollars for this industry. Furthermore, as the Federal government mistakenly deals with risk devoid of exposure, those practices influence public opinion, and lead states to developing similar misdirected regulatory structures. This should be prime issue for ORIA and EPA to resolve.